

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANNIE ELLENBERGER,

Appellant,

VS

EARL WARREN, JAMES R. AGEE, A. F. BRAY,
RAYMOND E. PETERS and EDMUND G. BROWN,

Appellees.

REPLY BRIEF AND MOTION TO DISMISS
FOR APPELLEE JAMES R. AGEE

J. F. COAKLEY,
District Attorney in and for the
County of Alameda, State of
California,

R. ROBERT HUNTER,
Assistant District Attorney in
and for the County of Alameda,
State of California,

RICHARD H. KLIPPERT,
Deputy District Attorney in and
for the County of Alameda,
State of California,

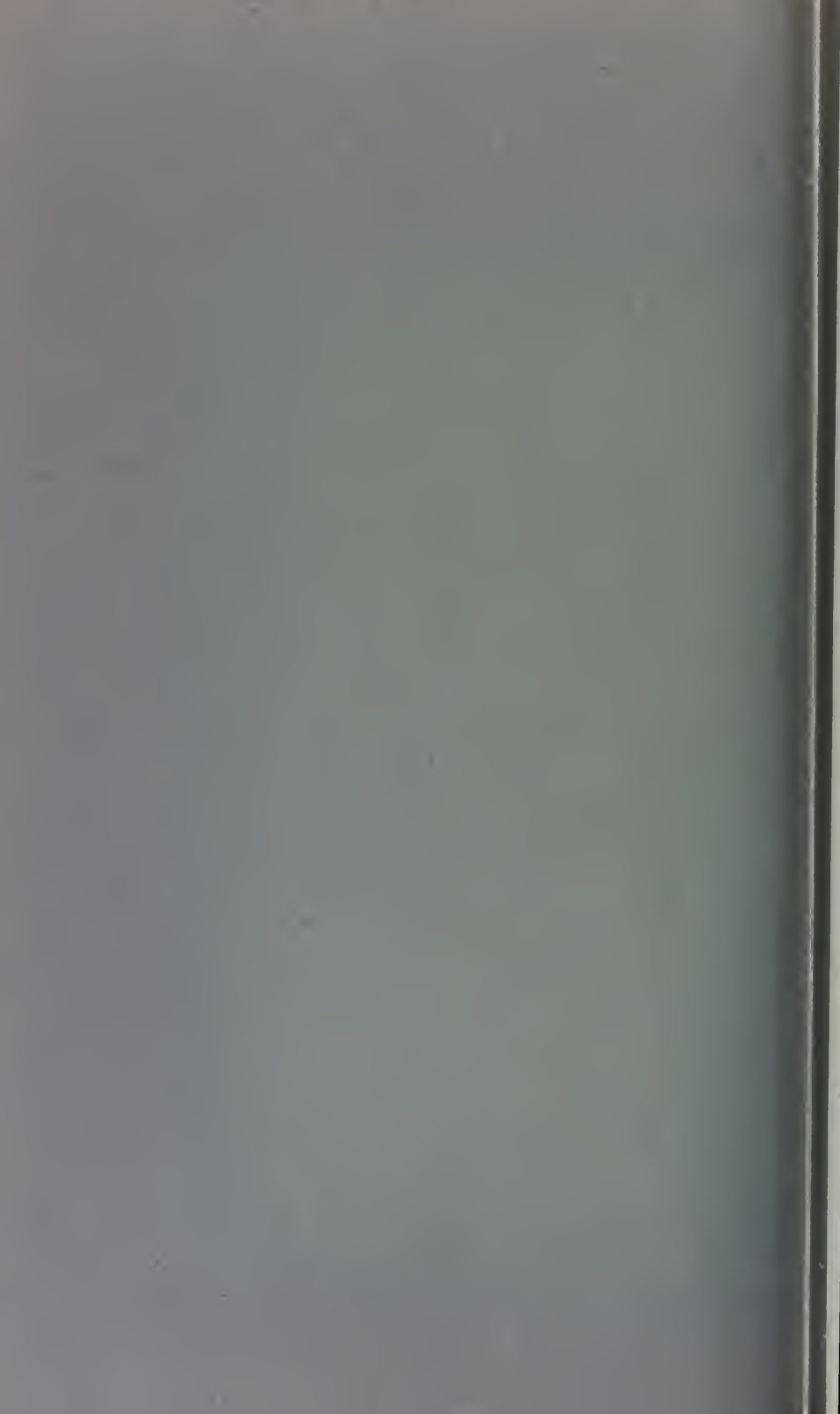
Attorneys for Appellee,

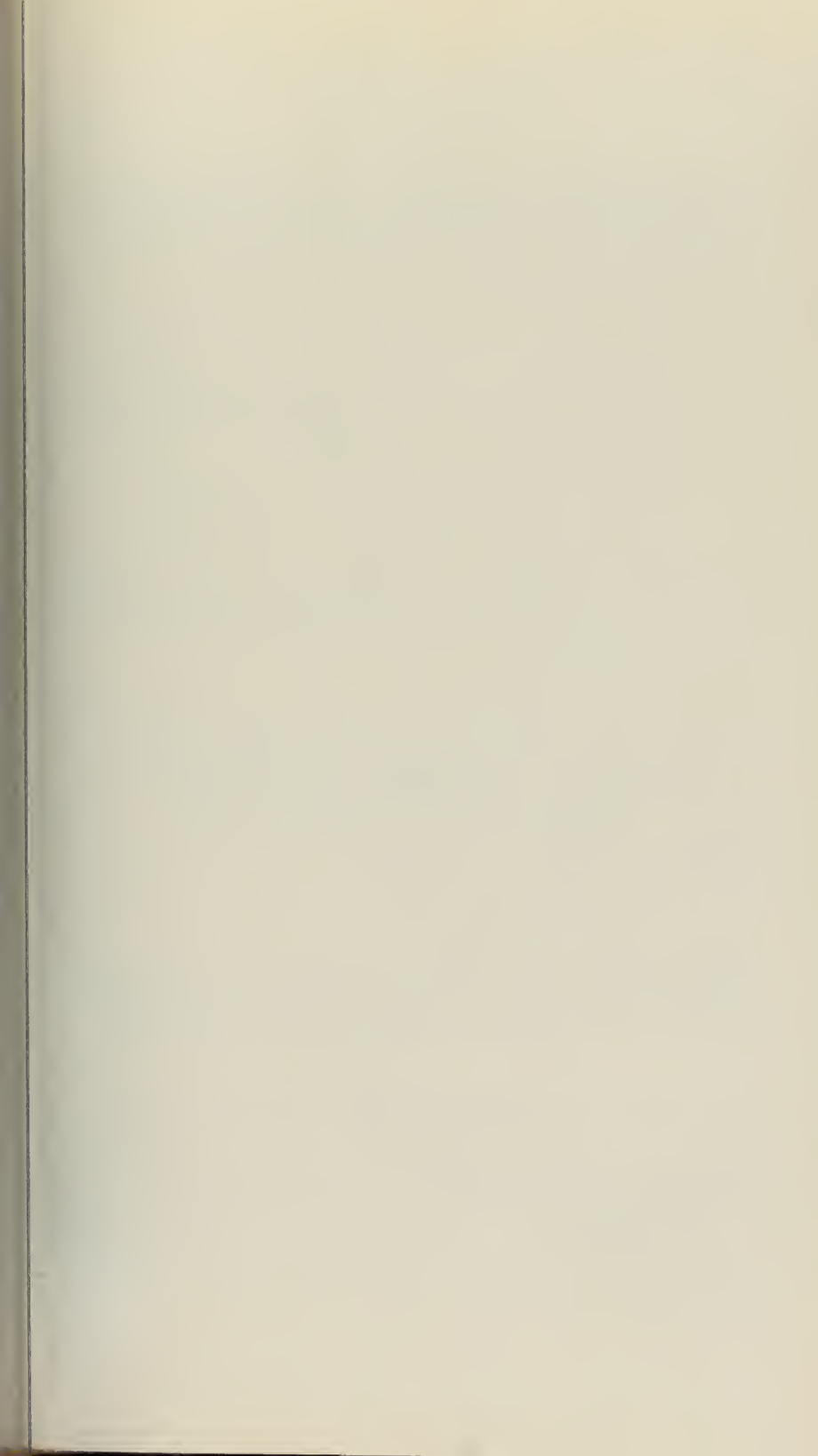
JAMES R. AGEE

FILED

OCT 2 1952

PAUL M. O'BRIEN





SUBJECT INDEX

Page

I. STATEMENT OF FACTUAL SITUATION OF CASE INVOLVING THE APPELLEE JAMES R. AGEE, JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA	1
II. ARGUMENT	2
The complaint in this action fails to state a cause of action	3
No federal question is here involved	3
This appellee is immune from suit	3
Appellant is estopped from bringing this action	3
This complaint is barred by the Statute of Limitations	4
III. NOTICE OF MOTION TO DISMISS	5

TABLE OF AUTHORITIES CITED
CASES

Ellenberger v. Warren, 90 Cal. App. 2d 785	3
Meader v. Norton, 78 U. S. 442, 457	4
U. S. v. Kusche, 56 Fed. Supp. 201	4
Spalding v. Vilas, 161 U. S. 483	3

RULES

Federal Rules of Civil Procedure:	
Rule 12(b)(1)	3
Rule 12(b)(6)	3

No. 13,237

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANNIE ELLENBERGER,

Appellant,

VS

EARL WARREN, JAMES R. AGEE, A. F. BRAY,
RAYMOND E. PETERS and EDMUND G. BROWN,

Appellees.

REPLY BRIEF AND MOTION TO DISMISS
FOR APPELLEE JAMES R. AGEE

I

STATEMENT OF FACTUAL SITUATION OF CASE INVOLVING
THE APPELLEE JAMES R. AGEE, JUDGE OF THE SUPERIOR
COURT OF THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF ALAMEDA.

On June 17, 1948 appellant filed in the trial court a petition for writ of mandate, petition to clear the records, conspiracy to violate civil right, damages, against Governor Earl Warren and numerous city and county officials. This proceeding was based upon the action of the board of trustees of the Police Relief and

Pension Fund of the City of Oakland in denying appellant's claim for a widow's pension based upon a finding of said board that the injury which appellant's husband incurred was not received in the line of duty. All appellees in this action demurred and the demurrers of said appellees were sustained by Judge James R. Agee, without leave to amend, on numerous grounds including the ground that the statute of limitations had run against appellant's action. Your appellant appealed to the District Court of Appeal of the State of California from the ruling of Judge James R. Agee and the District Court of Appeal on March 23, 1949 affirmed the judgment of the trial court and of appellee James R. Agee, Judge of said Court. The action of appellee James R. Agee in sustaining the demurrers without leave to amend was the only action taken by said appellee James R. Agee in connection with any of the facts set forth in your appellant's complaint on file herein.

II

ARGUMENT.

This matter was heard solely upon the pleadings which have been certified to this Court and upon the argument of counsel. There is nothing before this Court for consideration other than the question of whether or not the District Court properly granted the various motions to dismiss made on behalf of the appellees. It is our contention that those motions were properly granted.

The Complaint in this Action Fails to State a Cause of Action.

This complaint is vague and indefinite, both as to the legal grounds upon which it is brought and the remedy sought against this appellee, and states no cause of action.

A motion to dismiss lies where the facts pleaded in the complaint fail to state a claim upon which relief can be granted.

*Rule 12 (b) (6),
Federal Rules of Civil Procedure.*

No Federal Question is Here Involved.

A motion to dismiss lies where plaintiff has failed in his complaint to state facts sufficient to give jurisdiction to the Federal Court over the subject-matter of the action.

*Rule 12 (b) (1),
Federal Rules of Civil Procedure.*

This Appellee is Immune from Suit.

As is alleged in this complaint and as this Court can notice judicially, no cause of action lies against a judicial officer for wrongs done in the course of official conduct.

Spalding v. Vilas, 161 U. S. 483.

Appellant is Estopped from Bringing this Action.

The merits of this cause of action have already been decided in *Ellenberger v. Warren*, 90 Cal. App. (2d) 785. The appellant is estopped from bringing

this action by virtue of the judgment in the decision immediately above referred to. Further, in this proceeding the appellant cannot properly seek to set aside that judgment by alleging fraud in the original proceedings.

Meader v. Norton, 78 U. S. 442, at 457.

See also:

U. S. v. Kusche, 56 Fed. Supp. 201,

wherein the Court points out that litigation cannot be made eternal by reopening matters already decided, by the mere allegation of fraud somewhere in the proceedings.

This Complaint is Barred by the Statute of Limitations.

It is alleged in this complaint that on July 29, 1939 a false autopsy report was filed by the Coroner of the County of Alameda; appellant cannot now—twelve years after she first discovered the alleged fraud—seek to have that particular issue adjudicated in this Court, after the same has been adjudicated before every appellate tribunal of the State of California.

III

NOTICE OF MOTION TO DISMISS.

Wherefore appellee James R. Agee hereby gives notice to Annie Ellenberger, appellant, that he will move this Honorable Court at the time this case is set for argument:

1. To dismiss the action because the Court lacks jurisdiction over the subject-matter of this action.

2. To dismiss the action because the complaint fails to state a claim upon which relief can be granted.

3. To dismiss the action because the complaint fails to state any claim or claims against the appellee upon which relief can be granted, as it cannot be ascertained how or in what manner appellee is liable in any manner for any wrongs suffered by the appellant.

4. To grant a summary judgment in favor of the appellee because the appellant is directly estopped to bring this action by virtue of the fact that this matter has already been adjudicated by the District Court of Appeal of the State of California in the case of *Ellenberger v. Warren*, 90 Cal. App. (2d) 785.

Dated: October 24, 1952.

J. F. COAKLEY,
District Attorney in and for the
County of Alameda, State of
California,

R. ROBERT HUNTER,
Assistant District Attorney in
and for the County of Alameda,
State of California,

RICHARD H. KLIPPERT,
Deputy District Attorney in and
for the County of Alameda,
State of California,
Attorneys for Appellee,

JAMES R. AGEE
Court House, Oakland 7,
California.

